EXECUTION OF POWERS IN EQUITY. — When a donee of a power purports to appoint, and the appointment is invalid at law on account of a defect in form, equity anomalously gives it full effect at the suit of two classes of appointees: first, those who gave value, including creditors;[1] and secondly, those whose position is said to constitute a meritorious consideration, limited roughly to charities,[2] wives,[3] and children.[4] Further, when a donee with present power to appoint binds himself by a valid legal contract for valuable consideration to exercise his power, but dies without so doing, the contract is held a good execution of the power in equity;[5] not, surely, on the theory of specific performance, for the defendant is the remainderman, who is not in privity with the covenantor. Rather, then, is this a second kind of defective execution.[6] This conclusion coincides with two decisions that covenants running to the second class of appointees — wives[7] and children[8] — are also good appointments in equity, though unsupported by that valuable consideration required as a basis for specific performance. Though equity, therefore, will help out these two sorts of defective execution in favor of both classes mentioned, no aid will be given where there is a mere declaration of intent[9] by the donee, or when the donee's agreement to appoint is unenforceable at law, though it be for value.[10]

The conclusion reached above will be of aid in solving the question as to the effectiveness of a covenant to appoint in respect to the time of its execution. If the covenant is to be enforced against the remainderman as a defective execution of the power, then it cannot be effectual unless a formally correct appointment made at the same time would have been valid. Now, with reference to the time when a power may be exercised, powers not presently absolute fall into two divisions. The first consists of powers the effectiveness of an exercise of which depends on the happening of some contingency. Here no reason appears why an appointment made at any time, though before the contingency happens, should not be good on the happening of the event specified. The second division comprises those cases where the donor imposes a limitation, not on the circumstances under which an execution of a power will be effectual and the appointee take his appointed estate, but on the conditions under which alone the donee may exercise his discretion and make an appointment. In the former division the donor restricts the estates over which the donee's disposition will be effectual; in the latter he also circumscribes the discretion of the donee in appointing those estates. Here, therefore, a premature appointment is ineffectual. In deciding into which of these divisions, determined as they are by the intent of the donor, a specific case falls, it must be noted that more weight is to be given the nature of the condition than the mere chance of wording. Though the dividing line is thus one fixed by questions of fact, yet its existence is clearly established by authority.[11] In the first division

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1 Wilkes *v.* Holmes, 9 Mod. 485.
2 Innes *v.* Sayer, 7 Hare 377.
3 Tollet *v.* Tollet, 2 P. Wms. 489.
4 Smith *v.* Ashton, 1 Ch. Cas. 263.
5 Coventry *v.* Coventry, 1 Str. 596; *In re* Dykes, L. R. 7 Eq. 337.
6 See Shannon *v.* Bradstreet, 1 Sch. & Lef. 52, 63.
7 Fothergill *v.* Fothergill, 1 Eq. Cas. Abr. 222, pl. 9.
8 Sarth *v.* Blanfrey, Gilb. 166.
9 Piggott *v.* Penrice, Prec. Ch. 471.
10 Blore *v.* Sutton, 3 Meriv. 237.
11 See Machir *v.* Funk, 90 Va. 284, 289. *Contra*, Johnson *v.* Touchet, 37 L. J. Ch. (N. S.) 25.

are cases where the contingency is the donee's surviving some one,[12] or coming into possession of a life estate;[13] in the second, cases where powers are given executors to sell on the termination of a life estate,[14] and cases of testamentary powers.[15]

Accordingly, in the case of covenants, we find that those made before the specified event are, in the first class of cases, good executions in equity,[16] and in the second, invalid.[17] The former are instanced by a series of cases where successive life estates were created with a power to any tenant in possession to appoint by way of jointure, and covenants to appoint made by life tenants before their subsequent coming into possession were held to be good equitable appointments, on the ground that the requirement that the life tenant be in possession affected only the arising of the appointee's interest, and was not a prescription of the time in which the donee was to make the appointment.[18] This same result was recently attained in a more extreme English case, where the power was created by the donor in his will, and the covenant was made before the donor's death, though after the execution of the will. *Charlton* v. *Charlton*, [1906] 2 Ch. 523. The case would of course have been correct had the covenant been made after the testator's death, but the present decision, though convenient and desirable, is difficult to support, for it is hard to see how a power can be exercised before it is created. It may, however, be followed on the reasoning that the operation of the covenant, the defective appointment, is suspended until the power is created, and that it then acts as an execution of the power from that time,[19] as a will passes after-acquired property.[20]

EFFECT OF BEQUESTS AND DEVISES TO A CORPORATION IN EXCESS OF CHARTER LIMITATIONS. — At common law a corporation has the implied power to acquire, by either purchase or devise, realty and personalty for the purposes of its business. Often the state, however, for reasons of public policy imposes by law express limitations either in amount or in kind. In almost every state except Pennsylvania the usual limitation against "holding" interdicted property is construed as including a limitation against "taking" such property.[1] Whether we construe this latter limitation as preventing the implication of a grant of full power to take property, or as merely inhibiting the use of that power, the determination of the rights of a corporation in personalty bequeathed to it in excess of charter limitations must be the same. On the death of a testator, his personal property passes to his personal representative for administration. If the corporation is seeking to get the bequest from him, the court should not aid it in abusing its powers and *a fortiori*

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12 Sutherland *v.* Northmore, 1 Dick. 56; Dalby *v.* Pullen, 2 Bing. 144.

13 *Cf.* Allford *v.* Allford, *infra*.

14 Sweigert *v.* Berk's Adm., 8 Serg. & R. (Pa.) 299; Booraem *v.* Wells, 19 N. J. Eq. 87; Carlyon *v.* Truscott, L. R. 20 Eq. 348.

15 Reid *v.* Shergold, 10 Ves. Jr. 370. See *In re* Parkin, [1892] 3 Ch. 510, 517.

16 *In re* Lambert's Estate, [1901] 1 Ir. Ch. D. 261.

17 Thacker *v.* Key, L. R. 8 Eq. 408.

18 Allford *v.* Allford, Gilb. 167; Jackson *v.* Jackson, 4 Bro. Ch. *462; Affleck *v.* Affleck, 3 Smale & G. 394.

19 *Cf. In re* Anstis, 31 Ch. D. 596.

20 *Cf.* Holroyd *v.* Marshall, 10 H. L. Cas. 191.

1 Wood *v.* Hammond, 16 R. I. 98; Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313.